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IN THE

Supreme Court of the United States

October Term, 1964.

No. 241.

JAMES B. CLOWER, DAN McWILLIAMS, and CLYDE RECTOR, Intervenors,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and TENNESSEE PRODUCTS AND CHEMICAL CORPORATION, ROANE ELECTRIC FURNACE DIVISION,

Respondents.

BRIEF OF RESPONDENT TENNESSEE PRODUCTS AND CHEMICAL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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OPINIONS BELOW.

The Decision and Order of the National Labor Relations Board in Case No. 10-CA-4850 dated March 22, 1963, is unreported. (See Appendix, page 13.). The Consent Decree entered by the Court of Appeals enforcing the Board's Decision and Order is unreported. (See Appendix, page 19.) The Order Denying Petition for Writ of Error Coram Nobis is reported at 329 F. 2d 873. (See Appendix, page 26.)

QUESTION PRESENTED.

I. May employees hired as replacements during a strike, and subsequently laid off and relegated to their proper position on the seniority list for recall purposes pursuant to an Order of the National Labor Relations Board, attack such remedial Order in the Court of Appeals by means of a Petition for Writ of Error Coram Nobis?

STATEMENT OF THE CASE.

The Employer operates an electric furnace plant at Rockwood, Tennessee. In September 1961, the Employer had on its active payroll approximately 405 production and maintenance employees: An additional 171 such employees were on layoff status with recall rights. At such time there was in force and effect a Collective Bargaining Agreement between the Company and Union containing grievance, arbitration and no-strike provisions.

Beginning on or about 12:01 A. M. September 7, 1961, the active employees engaged in a concerted work stoppage, which continued unabated until September 9, 1961, at which time the Company discharged all of such employees. On September 13, 1961, the Company directed the laid off employees to report to work. The employees in this group refused to report as directed and, on September 24, 1961, they were also discharged.

The Company, believing the strike to be unprotected and in derogation of the no-strike provisions of the Agreement, attempted on a number of occasions to persuade the Union and the striking employees that they should return to work. When these efforts proved unavailing, the Company, on or about October 10, 1961, was compelled to reopen the Plant and operate it with replacement employees who were hired as needed throughout the period which ended with the issuance of the Board's Order on March 22, 1963.

In November 1961, the Union filed unfair labor practice charges with the National Labor Relations Board alleging that the discharge of the active-status and layoff-status strikers was unlawful. The General Counsel of the Board thereafter issued a Complaint, and in June 1962, formal hearings thereon were held before a Trial Examiner.

In his Intermediate Report, in essence, the Trial Examiner found that there had existed in the Plant "abnor-

mally dangerous conditions for work" at the time the concerted refusal to work occurred and that such conditions were responsible for the work stoppage.

The Trial Examiner recommended that the Company be required to offer full and immediate reinstatement to all strikers affected by the abnormally dangerous gas and dust conditions, by discharging, if necessary, any replacement employees hired for the first time on or after September 9, 1961. As to strikers not directly exposed to the abnormally dangerous conditions, and as to employees who refused to return from layoff status, the Trial Examiner recommended dismissal of the Complaint.

Subsequent to issuance of the Intermediate Report, the Company, the General Counsel, and the Union all filed exceptions and briefs with the Board. The Company sought reversal of the Trial Examiner's factual findings and dismissal of the Complaint in its entirety. The General Counsel and the Union, in their respective exceptions, sought, on the other hand, to have the Board reverse the Trial Examiner's finding that strikers not directly exposed to the abnormally dangerous conditions and the laid-off employees were not entitled to the protections of the Act. The General Counsel and the Union sought the nullification of all discharges and the reinstatement of all the striking employees.

The legal issues set forth above were joined before the Board in August 1962. Thereafter, while the Board had the case under consideration, representatives of the Company, representatives of the General Counsel and representatives of the Union engaged in discussions as to the possibility of formal and final settlement of the pending unfair labor practice charges.

In such discussions, the General Counsel's representatives laid down and the Company was ultimately forced to capitulate to certain basic conditions for a final dispo-

sition of the unfair labor practice charges. Among other items, the Company was required to submit to the entry of a decree against it by the Court of Appeals; the Company was required to rescind and cancel the discharges of all striking employees; the Company was required to recall substantial numbers of the strikers, displacing, if necessary, replacement employees hired after the strikers had been discharged; and, the Company was required to pay specified sums of money to the strikers as reimbursement for lost wages during the period of time during which such remedy was deemed appropriate.

Respondent entered into such a formal Settlement Agreement with the General Counsel and the Union on February 18, 1963. Thereafter, the General Counsel tendered such Agreement t the Board. The Board thereafter reviewed and approved its terms and conditions and, on March 22, 1963, issued a Decision and Order requiring and directing the Company to comply with the various negative and affirmative provisions of such Decision and Order. (The Text of such Decision and Order appears in Appendix, pages 13 to 18.)

On March 29, 1963, the Board petitioned the United States Court of Appeals for the Sixth Circuit for a decree enforcing its Order against the Company. That Court issued such a Decree on April 8, 1963. Thereafter, the Company took the actions required by the Board's Order and the Court's Decree, and on June 28, 1963, the Company was advised by the Board that full compliance had been achieved and that the unfair labor practice case was being closed contingent on the Company's continued observance of the terms of the Board's Order.

On June 20, 1963, various of the replacements filed an action in Tennessee Chancery Court seeking relief from the remedial provisions of the Board's Order. This action was subsequently dismissed.

On August 26, 1963, a replacement filed an unfair labor practice charge with the Board alleging that the Company's

conduct in reinstating strikers pursuant to the Board's prior Order was an unfair labor practice. The General Counsel dismissed such charge.

Thereafter, on December 30, 1963, the Petition for Writ of Error Coram Nobis (Appendix, page 20) was lodged with the Court of Appeals. The Court's Order denying the Petition issued on April 1, 1964.

ARGUMENT.

Employees Hired as Replacements During a Strike, and Subsequently Laid Off and Relegated to Their Proper Position on the Seniority List for Recall Purposes Pursuant to an Order of the National Labor Relations Board, May Not Attack Such Remedial Order in the Court of Appeals by Means of a Petition for Writ of Error Coram Nobis.

The initial difficulty with this case stems from the fact that there is no foundation below in either the Court of Appeals or before the National Labor Relations Board to support the Petition for Writ of Certiorari or give the Petitioners any standing before this Court.

The underlying case or controversy is an unfair labor practice case involving the legality or illegality of the Company's action in discharging striking employees during a labor dispute that occurred in September 1961. That case was fully investigated and litigated before the National Labor Relations Board. That unfair labor practice case ended with a Decision and Order by the Board finding that unfair labor practices had occurred and that appropriate statutory remedies were applicable.

In essence, the Board directed and required that the Company cancel and revoke the discharges of all the striking employees, and reinstate, reimburse and recall a substantial number of such employees to active employment. The strikers recalled, in each case, had greater service and seniority with the Company than the individual replacement employees who were laid off as a consequence of the Board's remedial Order.

The reinstatement remedy deemed appropriate by the Board, in its disposition of the unfair labor practice case, is the remedy authorized by the statute and is the remedy

normally and traditionally applied by the Board in unlawful discharge cases.

The Petitioners, who are apparently individuals that were laid off as part of the procedure necessary to carry out the Order of the Board, now complain because they were not invited to participate in the unfair labor practice case before the Board prior to the issuance of the Board's Decision and Order.

However, at no place in the present Petition for Writ of Certiorari or in the Petition for Writ of Error Coram Nobis in the Court below do the Petitioners establish or articulate the basis for their alleged right to have participated in the unfair labor practice case.

None of the Petitioners were employed by the Company at the time that the alleged "abnormally dangerous conditions for work" arose. None of the Petitioners were employed by the Company at the time the strike took place and at the time the discharge of the strikers occurred. The Petitioners' first employment with the Company did not begin until all of the incidents and events material to the labor dispute and the unfair labor practice had occurred.

Petitioners were not named as parties to or in any way included in the unfair labor practice proceedings before the Board or the Court of Appeals because they were neither charged with the commission of unfair labor practices nor were they in any way involved in the merits of the dispute. Their presence was not necessary in order to enable the Board to determine whether the Company had violated the statute or to make an appropriate remedial order against the Company. *N. L. R. B. v. Pennsylvania Greyhound Lines*, 303 U. S. 261; *General Investment Co. v. Lake Shore & M. S. R. Co.*, 260 U. S. 261, 285-286.

It is clear that Petitioners, as strangers to the unfair labor practice proceeding, had no right to there intervene. Moreover, it is clear that Petitioners never made any attempt to so intervene. Finally, it is clear that the Board

could not have permitted any such intervention, since such action would not have served any practical or proper legal purpose in the resolution of the unfair labor practice case.

In short, as established in the foregoing discussion, Petitioners are not parties to or privy to any of the prior proceedings in connection with the resolution of the unfair labor practice case, and they therefore have no standing to bring themselves or that case before this Court by means of a Petition for Writ of Certiorari.

The second basic defect in the Petitioners' position stems from their misunderstanding of the nature of the Board's function in relation to this type of unfair labor practice case. The Board, in the exercise of its authority under the National Labor Relations Act, and in connection with the case here under discussion, of necessity, had to resolve the rights of the strikers to their jobs. Having once established that unfair labor practices had occurred, the Board was then required to and did direct the necessary remedial actions to nullify the impact of the unfair labor practices on the unlawfully discharged employees.

Once the necessary remedial steps and corrective actions had been taken, and these actions were completed to the Board's satisfaction on or about June 28, 1963, the unfair labor practice case was closed and fully disposed of. Petitioners' Petition for Writ of Error Coram Nobis on December 30, 1963, even if otherwise meritorious, was at a minimum six months too late.

Here, it should be made clear that the Petitioners have not been deprived of their jobs or suffered other injury by the Board's Order or the Decree of the Court of Appeals enforcing such Order. It is apparent on the face of Paragraph 2(d) (Appendix, page 16) of the Board's Decision and Order that both the strikers and the replacements have been retained as employees of the Company with senority and recall rights. All that has happened in this situation is that employees with greater seniority are now actively at work pursuant to a traditional and authorized remedial

order issued by the responsible Government Agency having exclusive jurisdiction of the subject matter of this dispute.

The reduction in the relative seniority status of the replacements is not a deprivation of their rights, but rather is the natural and inevitable consequence of the fact that the Board has determined that other employees, with rights superior to those of the replacements, are entitled to have such superior rights recognized, protected and enforced by the Order of the Board that is here under assault.

The Court is here confronted with a request that if granted will subject this Court, the various Courts of Appeals, and the Board to unceasing, unending and unfruitful litigation in connection with the administration of the National Labor Relations Act. If any person indirectly or incidentally affected by an Order of the Board in an unfair labor practice case is permitted to attack such Order in the Federal Appellate Courts without regard to his formal status in the case or without regard to the fact that he has presented no charge to the Board recognizable under the Act, chaos must result. At a minimum, private parties will assume control of unfair labor practice litigation and will supplant the General Counsel of the Board, who thus far has been deemed to have exclusive power to initiate such litigation. *Hourihan v. N. L. R. B.*, 201 F. 2d 187 (C. A. D. C.), cert. denied, 345 U. S. 930; *Bandlow v. Rothman*, 278 F. 2d 866 (C. A. D. C.), cert. denied, 364 U. S. 909. Additionally, it will become impossible for any party to settle or otherwise adjust any matter with the Board at any step short of ultimate enforcement after adversary litigation in a Court of Appeals, since any such adjustment will apparently be open to collateral attack by all persons who may consider themselves to be dissatisfied with the Board's ultimate determination of the merits of the case.

The Court of Appeals, in its Order Denying the Petition for Writ of Error Coram Nobis (Appendix, page 26) correctly noted that there existed no basis under either the National Labor Relations Act or the Federal Rules of Civil

Procedure for that Court to entertain such an application in connection with this matter. It is respectfully submitted that Petitioners cannot here obtain relief from denial of an application that was and is unauthorized in law.

Aside from the basic procedural defect in Petitioners' application to the Court of Appeals, as noted above, there are obvious and basic substantive defects that caused the Court of Appeals to deny such application. Essentially, the Petitioners in the Court below asserted three grounds as a basis for a Writ of Error Coram Nobis.

First, they voiced dissatisfaction with the terms of the Board's remedial Order. Mere dissatisfaction, however, does not establish an entitlement to judicial relief. Second, they complained because they had not been given an opportunity to be heard before the National Labor Relations Board. Clearly, they had no right to be heard by the Board, and before both the Court of Appeals and this Court they have been unable to establish the basis of their claim in this regard. Third, and finally, they complained because the General Counsel of the Board had refused to issue an unfair labor practice Complaint attacking their layoffs. They have thus far presented no facts that would justify the Court of Appeals in taking the extraordinary step of directing the General Counsel to take such action in their behalf.

It is respectfully submitted that the decision of the Court of Appeals, *N. L. R. B. v. Tennessee Products and Chemical Corp.*, 329 F. 2d 873, here complained of, adequately, properly and correctly disposed of Petitioners' Petition for Writ of Error Coram Nobis.

CONCLUSION.

There is no case or controversy below that gives rise to the present Petition for Writ of Certiorari. The Petitioners are strangers to the unfair labor practice case, and their complaints are foreign to that case. Petitioners have not, in fact, been deprived of their rights or suffered a

denial of a hearing. Petitioners' dissatisfaction stems from the fact that other employees, with superior rights, have displaced them from immediate active employment. A Petition for Writ of Error Coram Nobis to a United States Court of Appeals is not available and is not appropriate as a means of asserting such alleged individual grievances.

The Petition for Writ of Certiorari pending before this Court should be denied.

Respectfully submitted,

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APPENDIX.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD IN CASE NO. 10-CA-4850.

STATEMENT OF THE CASE.

On June 14, 1962, Trial Examiner Owsley Vose issued his Intermediate Report and Recommended Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices, and recommending that it take specific action to remedy such unfair labor practices. Thereafter, all parties filed exceptions and briefs with the Board in support of their respective positions as to the allegations of the Complaint and findings and recommendations of the Trial Examiner.

Thereafter, on February 18, 1963, Tennessee Products & Chemical Corporation, herein called the Respondent; United Steelworkers of America, AFL-CIO, herein called the Union; and the General Counsel of the National Labor Relations Board, herein called the Board, entered into a Stipulation, in settlement of the case, subject to approval of the Board, providing for the entry of a consent order by the Board and a consent decree by any appropriate United States Court of Appeals. The parties withdrew their exceptions and briefs and waived all further and other procedure before the Board to which they may be entitled under the Act, and the Rules and Regulations of the Board, and waived their right to contest the entry of a consent decree or to receive further notice of the application therefor.

The aforesaid Stipulation is hereby approved and made a part of the record herein, and the proceeding is hereby

transferred to and continued before the Board for the entry of a Decision and Order, pursuant to the provisions of the said Stipulation.

Upon the basis of the aforesaid Stipulation and the entire record in the case, the Board makes the following:

Findings of Fact.

1. *The business of the Respondent.*

Respondent, Tennessee Products & Chemical Corporation, Roane Electric Furnace Division, a Tennessee corporation, annually ships goods valued in excess of $50,000.00 from its manufacturing facilities in Tennessee to points and persons located outside the State of Tennessee. The Respondent admits, and we find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. *The labor organization involved.*

United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

Order.

Upon the basis of the above findings of fact, the Stipulation, and the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

The Respondent, Tennessee Products & Chemical Corporation, Roane Electric Furnace Division, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging employees for engaging in strike or concerted activities protected by the Act, or in any like or related manner interfering with, restraining or coercing employees in the exercise of their right to self-organization, to form, join or assist any labor organ-

ization to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(b) Discouraging membership in the International Union, United Steelworkers of America, AFL-CIO, or in any other labor organization, by discharging employees or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment.

2. Take the following affirmative action which the Board finds will effectuate the policies of the National Labor Relations Act, as amended:

(a) As promptly as possible consistent with operating requirements, recall the employees found by the Trial Examiner to have been affected by the alleged abnormally dangerous working conditions at its plant on September 5 and 6, 1961. The names of all such affected employees (seventy-seven in number) are contained in Appendix "B" hereto, which is hereby incorporated into this Order as a part hereof. The employees recalled pursuant to this Section 2(a) shall be recalled in an order consistent with seniority subject to operating requirements and there shall be laid off an equivalent number of employees hired for the first time after September 11, 1961.

(b) In addition to the recall of the employees provided for in Paragraph 2(a) above, as promptly as possible consistent with operating requirements, recall a number of employees who participated in the work stoppage which shall represent the difference between said number of seventy-seven (77) and the number which is equal to two-thirds (⅔) of the total number

of employees actively at work in the bargaining unit on the date of this Order. The employees recalled pursuant to this Section 2(b) shall be recalled in an order consistent with seniority subject to operating requirements and there shall be laid off an equivalent number of employees hired for the first time after September 11, 1961.

(c) Terminate all discharges communicated to its employees beginning September 11, 1961 and arising out of the work stoppage beginning on or about September 6, 1961. Pay to each of said employees who was actively at work in the bargaining unit on September 6, 1961 an amount of money herein agreed to be the net amount due him as a result of such discharge. The names of all such employees are contained in Appendix "C" hereto, which is hereby incorporated into this Order as a part hereof, and the amount of money due each such employee appears opposite such employee's name.

The employees whose discharges are terminated pursuant to this Paragraph 2(c) but who are not recalled to work pursuant to the provisions of Paragraphs 2(a) or (b) hereof shall be restored to the master seniority list referred to in Paragraph 2(d) below.

(d) Establish a master seniority list containing the names of all persons who were employees in the collective bargaining unit on September 6, 1961 and all persons hired thereafter who are now at work and those who have rights to recall. Such seniority list is attached hereto as Appendix "D", which is hereby incorporated into this Order as a part hereof. The employees on said list have been ranked in order of seniority for recall purposes. There are no other em-

ployees or former employees who have any seniority rights as of the date of this Stipulation.

(e) In the event that a person to be recalled in accordance with the provisions of this Order is not qualified to do the work, the next highest ranked employee qualified to do the work will be recalled. The Company is directed to work out reasonable notice and reporting requirements with the Union in order to implement the provisions of this Order.

(f) Recalls under the provisions of Paragraphs 2(a) and (b) hereof will be accomplished as quickly as possible and in any event within (30) days from the date the job becomes available and the Employer is advised of the employee's availability to perform such job.

(g) A recalled employee shall be required to be examined by a Company physician for the purpose of determining whether he has incurred any injury or illness which will prevent him from performing his job.

(h) Post in conspicuous places in its plant at Rockwood, Tennessee, including all places where notices to employees are posted, copies of the Notice attached hereto as Appendix "A", which Appendix is hereby incorporated into and is to become a part of this Order. Copies of said Notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by the Employer's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least 60 consecutive days thereafter. Reasonable steps shall be taken by the Employer to insure that said Notices are not altered, defaced or covered by any other material.

(i) Upon entry of a Court Decree enforcing this Order, the Employer shall notify the Regional Di-

rector for the Tenth Region, in writing, within twenty (20) days after notice of entry of such Decree, as to the steps taken by the Respondent to comply herewith.

Dated, Washington, D. C., MAR 22 1963.

FRANK W. McCULLOCH,
Chairman

PHILIP RAY RODGERS,
Member

BOYD LEEDOM,
Member

JOHN H. FANNING,
Member

GERALD A. BROWN,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CONSENT DECREE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

THIS CAUSE was submitted upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Tennessee Products & Chemical Corporation, Roane Electric Furnace Division, its officers, agents, successors and assigns on March 22, 1963, in a proceeding before the said Board numbered 10-CA-4850; upon the transcript of the record in said proceeding, certified and filed in this Court, and upon a stipulation providing for the entry of a consent decree of this Court enforcing the order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Sixth Circuit, that the said order of the National Labor Relations Board be, and the same is hereby enforced; and that Respondent, Tennessee Products & Chemical Corporation, Roane Electric Furnace Division, its officers, agents, successors and assigns abide by and perform the direction of the Board in said order contained.

/s/ CLIFFORD O'SULLIVAN.
Judge, United States Court of Appeals for the Sixth Circuit.

PETITION FOR WRIT OF ERROR CORAM NOBIS.

Petitioners for a writ of error corum nobis, who seek to intervene in this cause, are citizens of Tennessee.

The National Labor Relations Board, which is mentioned as the petitioner in this cause, is an administrative body duly constituted by the Congress of the United States for the purpose of enforcing certain statutes of the United States dealing with matters of labor relations. The Tennessee Products & Chemical Corporation, Roane Electric Furnace Division, which appears as respondent in this case, is a Tennessee corporation having plants in Tennessee and engaging in interstate commerce so as to be within the jurisdiction of the National Labor Relations Board. The United Steelworkers of America, AFL-CIO, which is mentioned in the transcript of the record in the proceedings before the National Labor Relations Board at the time of the consent decree, is a labor organization doing business in Tennessee and throughout the United States.

Petitioners respectfully file this their petition for a writ of error coram nobis in this cause and would show unto the Court the following:

This Honorable Court heretofore and on the 8th day of April, 1963, put down an order in this cause, said order being designated a consent decree.

This order was put down without any notice thereof being given to petitioners and without their being a party thereto, although their rights were involved therein, as hereinafter set forth:

1. Petitioners are a part of a group of approximately two hundred (200) employees of Tennessee Products & Chemical Corporation, Roane Electric Furnace Division.

2. In September 1961 the United Steelworkers of America, AFL-CIO, hereinafter called the Union, had a contract as representing the employees of Tennessee Products & Chemical Corporation, Roane Electric Furnace Division

(which will hereinafter be called Tennessee Products), said contract providing that the Union would be recognized as representing the company's employees, and said contract also making provision for wages, hours and working conditions. This contract provided that it would terminate on September 15, 1962.

3. In Septen ber 1961, the Union struck at the company's plant, said strike being in violation of the then existing labor contract.

4. Following the calling of this strike, the company, which had been repeatedly harassed by a series of such illegal strikes, discharged the approximately four hundred fifteen (415) employees who had gone on said strike and began to replace said strikers with other workers, most of whom had never worked for the company before.

5. In hiring these workers to replace the discharged strikers, the company represented that it was hiring them on a permanent rather than a temporary basis, and that if said employees would accept employment, the company would protect them in their job rights and in the event the Union sought to force the re-employment of the discharged employees through the medium of the National Labor Relations Board, the company would contest such re-employment through the Supreme Court of the United States.

6. Petitioners and their fellow employees, totalling approximately two hundred (200), accepted employment by the company under these terms and went to work for the company, with the result that with a work force of less than fifty per cent (50%) of that formerly employed, the company operated with a better production record than it had prior to the strike.

7. Thereafter the Union filed charges against the company before the National Labor Relations Board, claiming that the company's action in discharging the four hundred fifteen (415) strikers was unlawful. This was done in Case

10-CA-4850, to which reference is made, the contents of this file having heretofore been filed with this Court, according to the consent decree.

8. Petitioners were not parties to the aforesaid proceedings before the National Labor Relations Board.

9. As reflected by the file in said case, a hearing officer was assigned to hear the case and after hearing the same, he ruled that although approximately seventy-seven (77) of the discharged strikers were justified in striking, because of dangerous working conditions, and should be rehired, all the rest of the four hundred fifteen (415) strikers had been lawfully discharged. He therefore recommended that the company he required to reinstate the seventy-seven (77) and to pay them back pay.

10. Thereafter, the company announced to these petitioners and their fellow employees that the decision would be appealed to the Courts.

11. However, instead of appealing said decision, which was handed down in the summer of 1962, the company, without advising petitioners and their fellow employees, subsequently entered into a conspiracy and deal with the Union and with representatives of the National Labor Relations Board which violated the rights of the petitioners and their fellow employees and unlawfully and unconstitutionally deprived them of their rights and their jobs, said conspiracy consisting of the actions hereinafter alleged.

12. The company, being fearful that it would have to pay the sum of approximately one million dollars to the 77 employees whom it had been ordered to rehire, agreed that if the Union would drop the demands insofar as said back pay was concerned, the company would not only rehire those 77 Union members who had been held to have been wrongfully discharged, but would also rehire substantially all the other strikers who had been ruled to have been lawfully discharged and would discharge petitioners and their fellow employees in order to effect this.

13. The Union, the company and the National Labor Relations Board (secretly, insofar as the then company employees were concerned) agreed to this action, thus depriving the 77 wrongfully discharged employees of their rights to back pay and also depriving petitioners and their fellow employees of their rights and their jobs, illegally and unconstitutionally.

14. This action was illegal because in March of 1963, when this agreement was reached and a new contract signed by the company and the Union, the Union did not actually represent the employees of the company because of the fact that their contract with the company had expired in September of 1962 and it was obvious on the face of the record that thereafter they were not the bargaining agency for the employees of the company, who at that time consisted of petitioners and their fellow employees.

15. The action was unconstitutional because of the Fifth Amendment to the Constitution of the United States in that it deprived petitioners and their fellow employees of their property rights and their jobs without due process of law in that they were not advised as to what was being done and were given no opportunity to appear and present their side of the case whatsoever, said action being taken by the National Labor Relations Board and the company and the Union in a secret and surreptitious manner insofar as these petitioners and their fellow employees were concerned, it being some weeks later before petitioners and their fellow employees found out anything about it.

16. The individuals involved who acted on behalf of the parties in this cause were Marcel Mallet-Prevost, Assistant General Counsel of the National Labor Relations Board, and Joseph Bell, attorney for the company. Petitioners herein do not know the name of the individual who acted on behalf of the Union, but charge that said information can be furnished by the individuals heretofore named.

17. Following their discovery of the situation, petitioners and their fellow employees employed counsel who

undertook to obtain relief through the National Labor Relations Board by filing a charge with that organization on August 23, 1963, it being hoped that the Labor Board would take some action to undo the grossly unfair and illegal arrangement that had been made and entered into.

18. However, the Regional Director of the National Labor Relations Board in Atlanta refused to issue a complaint.

19. Thereafter, an appeal was taken to the General Counsel of the National Labor Relations Board, and under date of November 6, 1963, a ruling was made by the office of the General Counsel that they were sustaining the ruling of the Regional Director. A copy of the charge that was filed with the National Labor Relations Board and a copy of the ruling by the office of the General Counsel of the National Labor Relations Board are attached hereto and made a part of this petition, but not for copy.

20. Having exhausted their efforts to obtain relief through the National Labor Relations Board, these petitioners now come to this Honorable Court asserting that the consent decree heretofore filed on April 8, 1963, should be set aside because of the facts and circumstances hereinbefore set forth, and the whole matter reopened to the end that justice be done.

WHEREFORE, these petitioners (all of whom have lost their jobs with the company as a result of the aforesaid conspiracy) file this their petition for a writ of error coram nobis and ask that this Honorable Court set aside the consent decree heretofore entered and do whatever is required by law and justice.

CHAMBLISS, CHAMBLISS & HODGE,

By .....
Jac Chambliss,
Attorneys for Petitioners.

STATE OF TENNESSEE }
COUNTY OF HAMILTON } ss.:

James R. Clower, Dan McWilliams and Clyde Rector, being first duly sworn, make oath that they are petitioners in the foregoing petition for a writ of error coram nobis and that they have read the said petition and that the facts therein set forth are true to the best of their knowledge, information and belief.

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Sworn to and subscribed before me this day of December, 1963.

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Notary Public.

My commission expires:

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR WRIT OF ERROR CORAM NOBIS.

Before O'SULLIVAN, PHILLIPS, and EDWARDS, *Circuit Judges.*

This matter is presented to us by a pleading entitled Petition for Writ of Error Coram Nobis. On April 8, 1963, this court, in this cause, entered a consent decree enforcing an order of the National Labor Relations Board. This order, entered pursuant to a settlement agreement between the National Labor Relations Board and respondent, Tennessee Products & Chemical Corporation, required, *inter alia*, that respondent rehire certain employees that it had discharged during the course of a strike, laying off, if necessary, employees who had replaced such discharged employees. The pleading before us is signed by three of such laid off employees. The relief sought is the vacation of our order of April 8, 1963, and the doing of "whatever is required by law and justice."

The petition avers the following facts as the grounds for relief. During the course of a strike respondent discharged the strikers. These employees were represented by United Steelworkers of America, AFL-CIO. Respondent company then began to replace the discharged strikers with other men, among which were petitioners.[1]

The AFL-CIO union, on behalf of the discharged strikers, thereupon filed with the NLRB a charge that respondent company was guilty of an unfair labor practice in discharging the strikers. A hearing was had and a Trial Examiner's report found that the company had violated the Act, by discharging some seventy-seven of the striking employees. The report held, however, that the remaining

[1] Petitioners assert that some 200 replacements were hired, and we assume that the named petitioners seek to assert the rights of all in that class.

strikers were not, during the work stoppage, engaged in a protected activity. The company was ordered to reinstate the seventy-seven. The Union and the Board's general counsel took exception to the Trial Examiner's report and contended that all strikers, a total of about four hundred, should be reinstated with back pay. Pending hearing before the Board, a settlement was reached whereby the company agreed to an order calling for the reinstatement of all the discharged Union members, laying off, if necessary, those that had replaced them. Our decree of April 8, 1963, enforced such order. We are asked coram nobis to vacate our decree.

While coram nobis, as a civil writ, was abolished by Rule 60(b) of the Federal Rules of Civil Procedure, it was permitted survival or revival in criminal practice by *United States v. Morgan*, 346 U. S. 502, 98 L. Ed. 248. Our function in litigation arising under the National Labor Relations Act is well defined by that Act, and we find nothing therein giving us the right to entertain original applications for writs of error coram nobis. We doubt, too, whether in such matters we have any general equity powers.

Apart, however, from procedural labels, we do not think that the present address to us calls for or permits action on our part. We need not decide whether the present petitioners would or should have been allowed to intervene in the above-entitled cause, had a request therefor been made to the NLRB or to us before the matter was finalized by our decree. After our decree, one or more of the present petitioners did file with the appropriate Regional Director of the NLRB a charge asserting that what was accomplished by the carrying out of the settlement, approved and enforced by our decree, and which resulted in the layoff of some or all of these who replaced the reinstated strikers, was an unfair labor practice. The Regional Director of the NLRB, as well as its general counsel, refused to issue a complaint. In the case of *Dunn v. Retail*

Clerks, 307 F. (2d) 285 (CA 6, 1962), we held that neither a District Court nor ourselves have power, by mandamus or otherwise, to command the NLRB to issue such a complaint. Such, too, was the holding in *Hourihan v. NLRB*, 201 F. (2d) 187 (CA.—D. C., 1952), cert. den., 346 U. S. 930, and *Bandlow v. Rothman*, 278 F. (2d) 866 (CA.—D. C., 1960), cert. den. 364 U. S. 909. As we stated in *Dunn v. Retail Clerks, supra:*

> "Congress has invested the N. L. R. B. and its agents with powers which, if withheld or abused, can visit serious and irreparable harm upon those who, under the scheme of the N. L. R. A. cannot obtain the help of judicial intervention. Foreclosed as we are from entrance by judicial writ into such a situation, we must leave an injured party to the assistance of those empowered to apply administrative remedies or executive correction." (307 F. (2d) 289)

The petition before us also infers that when the petitioners were hired as replacements for the strikers, promises were made which might give them some contractual rights to continued employment. But, whatever the status of petitioners' alleged contractual rights, this court is not the forum in which to vindicate them. Our function is fundamentally appellate in NLRB matters. It has been held that, since administrative bodies are created to serve the public interest, they are not a proper forum for the litigation of private contractual rights. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 268, 84 L. Ed. 738, 743 (1939).

The petition now before us is denied.

Approved for entry.

CLIFFORD O'SULLIVAN,
United States Circuit Judge.